

3

CFH007

IN THE HIGH COURT OF JUDICATURE CHHATTISGARH AT BILASPUR

W.P.NO. 2859/2003

PETITIONER

: Dhaluram Kosaria
S/o Mahettar Ram Kosaria,
Aged about 32 years,
R/o Village Kapa, PO:Mahroom,
Tehsil & Ditt.Rajnandgaon (CG).

VERSUS

RESPONDENTS

- : 1) State of Chhattisgarh
Through the Secretary,
Panchayat Department,
DKS Bhawan, Raipur (CG).
- 2) The Chief Executive Officer,
Japad Panchayat, Chhuriya,
District Rajnandgaon (CG).
- 3) Sarpanch,
Gram Panchayat, Gunderdehi,
Block Chhuriya
District: Rajnandgaon (CG).

P. R. No. 2705/03
Presented by Shri. Gauram Khatrapal
dated 09.09.03

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF

I N D I A

203

AER

7.7.06

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 2859 of 2003

Petitioner

Dhaluram Kosaria

Versus

Respondents

State of Chhattisgarh & others

Post for order on 7th July, 2006.

Sd/-
Satish K. Agnihotri
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 2859 of 2003

Petitioner

Dhaluram Kosaria

Versus

Respondents

State of Chhattisgarh & others

SB: Hon'ble Mr. Justice Satish K. Agnihotri, J

Shri Parag Kotecha, Advocate for the petitioner.

Smt. Anju Ahuja, Deputy Government Advocate for the respondent No.1.

Shri Sandeep Dubey, Advocate for the respondent No.2 and 3.

ORDER

(7th July, 2006)

The following order of the Court is passed by **Satish K. Agnihotri, J.**

1. The present petition filed under Article 226/227 of the Constitution of India impugns the order dated 6.9.2003 (Annexure P/6) passed by the respondent No.3 as being unconstitutional on the ground that the petitioner was not afforded any opportunity of hearing and the order was passed in contravention of the provisions of Rule 7 of the Chhattisgarh Panchayat Service (Discipline and Appeal) Rules, 1999 (for short 'the Rules, 1999'). It was further prayed that the respondents be directed to allow the petitioner to perform his duties as Panchayat KarMI-Secretary of the Gram Panchayat, Gunderdehi, Block- Churia, District- Rajnandgaon.
2. The undisputed facts, in nutshell, are that the petitioner was appointed as Panchayat KarMI on temporary basis on fixed pay of Rs. 500/- p.m. by order dated 22.7.1996 (Annexure P/1). The petitioner was thereafter appointed as Panchayat Secretary in the same Gram Panchayat by the Collector (Panchayat Branch), Rajnandgaon under the provisions of Section 69 (1) of the Madhya

Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 by order dated 10.8.2000 (Annexure P/2). The Deputy Director, Panchayat and Social Welfare Department, Rajnandgaon issued a memo dated 17.2.2003 (Annexure R-2/3) to the Sarpanch-Secretary stating that there were complaints against the Sarpanch and the petitioner-Secretary. The Secretary-petitioner along with Sarpanch was directed to remain present on 19.2.2003 in the office of the Gram Panchayat, Gunderdehi to participate in the enquiry. Pursuant to the said memo the enquiry was held on 19.2.2003 and 25.2.2003 by the Deputy Director, Panchayat and Social Welfare Department, Rajnandgaon wherein allegations of misbehaviour, assault and fighting was proved partly. With regard to the second charge of pendency of criminal case under section 420, it was found not proved. Third charge with regard to leaving the meeting of Gram Sabha was also found proved. Fourth charge with regard to the irregularities in construction of W.B.M. road was also found proved. Fifth charge with regard to irregularity in payment of pension was not found proved. Sixth charge of not holding the meeting monthly was found proved and seventh charge of irregularity in allotment of Indira Awas was not found proved.

On the basis of this enquiry report, the Deputy Director, Panchayat and Social Welfare, Rajnandgaon, vide letter dated 21.7.2003 (Annexure R-1/6) addressed to the Sarpanch, Gram Panchayat Gunderdehi, directed to issue show cause notice to the petitioner and on receipt of the reply, if any, General Sabha of the Gram Panchayat being competent, may remove the petitioner from service. Accordingly, the meeting of the Gram Sabha was held on 25.8.2003 (Annexure R-3/8) wherein a reference of the letter dated 21.7.2003 of the Deputy Director was made and it appears that the same was discussed also.

The Gram Sabha resolved by majority to remove the petitioner (Secretary) from the post in Gram Panchayat, Gunderdehi.

4. Pursuant to the said Gram Sabha resolution the services of the petitioner as Panchayat Karmi was terminated vide order dated 6.9.2003 (Annexure P/6).
5. Shri Parag Kotecha, learned counsel appearing for the petitioner submits that Rule 7 of the Rules, 1999 provides for procedure before terminating service of a member of Panchayat. In the instant case, the said provisions were not followed, no definite charges were framed and the petitioner was not served with the articles of charges before holding an enquiry leading to termination of the petitioner from his services.
6. Learned counsel further submits that though it was an appointment on temporary basis but the termination order was passed on the basis of certain alleged irregularities found proved in the enquiry conducted by the Deputy Director. The order is stigmatic. The same could not have been passed without following the provisions of law, prescribed in Rule 7 of the Rules 1999.
7. Smt. Anju Ahuja, learned counsel appearing for the respondent No.1 and Shri Sandeep Dubey, learned counsel appearing for the respondents No. 2 and 3, on the contrary, submitted that the petitioner was appointed temporarily and the order of termination was passed in terms of the appointment. It was further submitted that it is true that a preliminary enquiry was held and definite charges, as prescribed in Rule 7(2) of the Rules, 1999, were not framed before holding enquiry. However, in the facts of the case that the order of termination was passed not on account of the enquiry but in terms of the appointment, there was no necessity of holding enquiry in

accordance with the prescribed procedure under the provisions of the Rule 7 of the Rules, 1999.

8. It was further contended that the order was simpliciter termination and not stigmatic. Lastly, it was contended that there is availability of alternative remedy and as such this petition be dismissed on the ground of availability of the alternative remedy.
9. After having heard learned counsel for the parties and having perused the records appended to the petition and the return it is evident that the impugned termination order was passed on 6.9.2003 on the basis of the preliminary enquiry held by the Deputy Director, Panchayat and Social Welfare Department. The letter dated 21.7.2003 (Annexure R-1/6) of the Deputy Director, Panchayat and Social Welfare Department, Rajnandgaon, addressed to the Sarpanch, Gram Panchayat, Gunderdehi, clearly stated that the Gram Panchayat has full administrative control to take disciplinary action against Panchayat Karmi, after issuing proper show cause notice and considering the reply thereafter etc. Admittedly, the general body of the Gram Panchyat acted on the letter dated 21.7.2003 and passed the order of termination of the petitioner from the post of Panchayat Karmi without following the proper procedure of law as prescribed under Rule 7 of the Rules, 1999, which is reproduced herein below:-

"7. Procedure for imposing major penalties.-(1) No order, imposing on a member of the Panchayat Service, any of the penalties specified in clause (iv) to (via) of rule 5 shall be passed except after a formal inquiry is held as far as may be, in the manner hereinafter provided.

(2) When an order for formal inquiry has been made, the disciplinary authority shall frame Definite charges on the basis of allegations and shall communicate such charges, alongwith the statement of the allegations, to the member of the Panchayat Service and also require him to submit, within such time as may be specified

a written statement of defence and also to state whether he desires to be heard in person.

(3) The person against whom inquiry is to be held shall, for the purpose of preparing toe defence, be permitted to inspect and take extracts from such records as he may specify:

Provided that such permission may be refused if, for reasons to be recorded in writing, in the opinion of the Enquiry Officer such records are not relevant for the purpose or it is against the public interest to allow his access thereto.

(4) On receipt of the written statement of defence or if any such statement is not received within the time specified, the disciplinary authority may himself enquire into such of the charges as are not admitted or appoint an Enquiry Officer to hold the inquiry and forward to him his report and, if advised, his recommendation alongwith all the inquiry papers.

(5) The disciplinary authority may nominate any person to present the case in support of the charges before the Enquiry Officer. The member of the Panchayat Service may present his case with the assistance of any other Panchayat Servant of State Government Servant approved by the Enquiry Officer but may not engage a legal practitioner for the purpose, unless the person nominated by the disciplinary authority as aforesaid is a legal practitioner or unless the disciplinary authority having regard to the circumstances of the case so permits.

(6) If the servant of the Panchayat Service desires to be heard in person, fie shall be so heard. If he so desires or if the disciplinary authority so directs, an oral enquiry shall be held by the Enquiry Officer. At such inquiry evidence shall be heard as to such of the allegations as are not admitted and the person charged shall be entitled to cross examine the witness, to give evidence in, person, to produce documentary evidence, if any, and to have such witness called as he may wish:

Provided that the Enquiry Officer may, for reasons to be recorded in writing, refuse to call a witness.

(7) At the conclusion of the inquiry, the Enquiry Officer shall prepare a report of the inquiry, recording his findings on each of the charges together with reasons therefore.

(8) The proceedings conducted against the persons charged shall contain a sufficient record of

- (i) the charges framed against such person and the statement of allegations;
- (ii) the written statement of defence if any;
- (iii) the oral evidence taken in the course of the inquiry;
- (iv) the documentary evidence considered in the course of the inquiry;
- (v) the orders, if any, made by the Enquiry Officer or the disciplinary authority as the case may be with regard to the inquiry;
- (vi) a report setting out the findings on each charge and the reasons therefore.

(9) the Enquiry Officer, if he is other than the disciplinary authority, shall submit the records of the proceedings mentioned in clause (8) above to the disciplinary authority without recommendation relating to the penalty to be imposed. The disciplinary authority shall consider the record of the enquiry and its findings on each charge, having regard to the findings on the charges and the record (if the proceedings) if he is of the opinion that any of the penalties specified in clauses (iv) to (vii) of rule 5 should be imposed, it shall furnish to the person charged a copy of the report of the Enquiry Officer, and where the disciplinary authority is not the Enquiry Officer a statement of its findings together with brief reasons for disagreement, if any, with the findings of the Enquiry Officer.

(10) The disciplinary authority shall consider the representation, if any, made by the person charged in response to the notice and determine the penalty, if any, should be imposed and shall pass appropriate order on the case.

(11) The orders passed by the disciplinary authority shall be communicated to the member of the Panchayat Service, who shall also be supplied with a copy of the report of the Enquiry Officer and where, disciplinary authority is not the Enquiry Officer, a statement of its findings together with the brief reasons for disagreement, if any, with the findings of the Enquiry Officer, unless they have already been supplied to the person charged."

10. The contention of the respondents that the petitioner was holding a temporary post, as such no enquiry was necessary, as the termination order was not punitive and it was termination simpliciter in terms of the appointment order cannot be accepted. On perusal of the papers it is clear that it was not a termination simpliciter but the termination order was passed on the basis of certain allegations which were found proved by the Deputy Director, Panchayat and Social Welfare Department. The general body of the Gram Panchayat has passed the resolution on the basis of the letter dated 21.7.2003 of the Deputy Director, Panchayat and Social Welfare, hence it could not be held that it was a termination simpliciter.

11. The Supreme Court in the case of **Anoop Jaiswal Vs. Government of India and another** { (1984) 2 SCC 369 } has observed in para 12, as under:-

"12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

12. The Supreme Court in the case of **Indra Pal Gupta Vs. Managing Committee, Model Inter College, Thora** { (1984) 3 SCC 384 } has observed in paragraphs 10 and 11, as under:-

"10. It is seen from the letter dated June 30, 1969 by which the services of the appellant were terminated that the resolution of the Managing Committee dated April 27, 1969 is made a part of it by treating it as an enclosure to that letter. The resolution actually begins with a reference to the report of the Manager, and states that the facts contained in the report were 'serious' and 'not in the



interests of the institution". It further refers to the fact that the appellant was asked to give his explanation to the allegations made in the said report. That report stated :

It is also evident that the seriousness of the lapses is enough to justify dismissal but no educational institution should take that botheration.

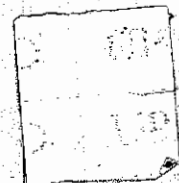
11. The above report was the real foundation on which the decision of the Managing Committee was based. This is a case where the order of termination issued is merely a camouflage for an order imposing the penalty of termination of service on the ground of misconduct....."

13. The Supreme Court in the case of **Radhey Shyam Gupta Vs. U. P. State Agro Industries Corporation Ltd. and another** {(1999) 2 SCC 21} has observed in para 34, as under:-

"34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive."

14. The Supreme Court in the case of **Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others** {(1999) 3 SCC 60} has observed in para 35, as under:-

"35 The above decision is, in our view, a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted....."

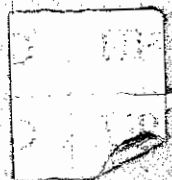


15. The Supreme Court in the case of **Nar Singh Pal Vs. Union of India and others** { (2000) 3 SCC 588} has held as under:-

"The appellant, although a casual labour, had acquired temporary status. Once an employee attains the "temporary" status, he becomes entitled to certain benefits one of which is that he becomes entitled to the constitutional protection envisaged by Article 311 of the Constitution and other articles dealing with services under the Union of India. The services were terminated on account of the allegation of assault made against the appellant. The order of termination in the instant case, cannot be treated to be a simple order of retrenchment. It was an order passed by way of punishment and, therefore, was an order of dismissal which, having been passed on the basis of preliminary inquiry and without holding a regular departmental inquiry, cannot be sustained."

16. The Supreme Court in the case of **Chandra Prakash Shahi Vs. State of U.P. and others** { (2000) 5 SCC 152} has observed in para 12, as under:-

"12. Now, it is well settled that the temporary government servants or probationers are as much entitled to the protection of Article 311 (2) of the Constitution as the permanent employees despite the fact that temporary government servants have no right to hold the post and their services are liable to be terminated at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service. The courts can, therefore, lift the veil of an innocuously-worded order to look at the real face of the order and to find out whether it is an innocent as worded. (See: Parshotam Lal Dhingra v. Union of India.) It was explained in this decision that inefficiency, negligence or misconduct may have been the factors for inducing the Government to terminate the services of a temporary employee under the terms of the contract or under the statutory Service Rules regulating the terms and conditions of service which, to put it differently, may have been the motive for terminating the services but the motive by itself does not make the



order punitive unless the order was "founded" on those factors or other disqualifications."

17. The Supreme Court in the case of State of Punjab and others Vs. Balbir Singh { (2004) 11 SCC 743} has observed in para 7, as under:-

"7. Thus the principle that in order to determine whether the misconduct is motive or foundation of order of termination, the test to be applied is to ask the question as to what was the "object of the enquiry". If an enquiry or an assessment is done with the object of finding out any misconduct on the part of the employee and for that reason his services are terminated, then it would be punitive in nature. On the other hand, if such an enquiry or an assessment is aimed at determining the suitability of an employee for a particular job, such termination would be termination simpliciter and not punitive in nature. This principle was laid down by Shah, J. (as he then was) as early as 1961 in the case of State of Orissa v. Ram Narayan Das⁷. It was held that one should look into "object or purpose of the enquiry" and not merely hold the termination to be punitive merely because of an antecedent enquiry. Whether it (order of termination) amounts to an order of dismissal depends upon the nature of the enquiry, if any, the proceedings taken therein and the substance of the final order passed on such enquiry....."

18. In the instant case the facts of the case clearly establish that the termination of the services of the petitioner was not a termination simpliciter but on the basis of the alleged irregularities and misconduct committed by the petitioner.

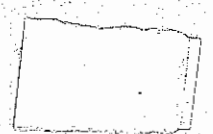
19. It is further admitted by all the parties that the procedure for holding an enquiry is prescribed under Rule 7 of the Rules 1999 for imposition of major penalty, that has not been followed. Hence, the termination is bad and vitiated on the ground of non-compliance of the statutory provisions and denial of the principles of natural justice. It amounts to infraction of not only the provisions of Rule 7 of the Rules 1999 but the provisions of Article 311 (2) of the Constitution of India also. The order is in fact penal in nature having civil

consequences and as such the elaborate provision of Section 7 of the Rules 1999 was applicable in the case of the petitioner before terminating his services.

20. With regard to the availability of the alternative remedy it is well settled that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of the compulsion. In the present case the facts are not disputed. The entire case rests on the infraction of constitutional protection prescribed under Article 311 (2) of the Constitution of India and non-application of the statutory provisions, as such the alternative remedy may not be a proper forum. The Supreme Court in the case of **Harbanslal Sahnia and another Vs. Indian Oil Corporation Ltd and others** { (2003) 2 SCC 107} in para 7 has held as under:-

"7. suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction of the vires of an Act is challenged....."

21. A Division Bench of this Court in the case of **Gurumukh Singh Hora Vs. State of Chhattisgarh and others** { 2004 (3) M.P.H.T. 29 (CG)} has followed the dicta laid down by the Supreme Court in the case of **Harbanslal Sahnia** (Supra).
22. For the reasons and the discussions made hereinabove, and the dicta laid down by the Supreme Court in various cases, cited above, the order of termination dated 6.9.2003 is bad and is quashed.
23. On the question of back wages, no foundation has been laid to establish the fact that whether the petitioner was gainfully employed



elsewhere or not during this period. Even otherwise keeping in view that the termination order has been vitiated not on merit but on account of non-compliance of the statutory provisions before terminating the services of the petitioner, 30% back wages would be sufficient in the interest of justice.

24. Accordingly, the writ petition is allowed. No order as to costs.

Sd/-
Satish K. Agnihotri
Judge

Thakur